SIMON LIM v. COLONEL CHRISTIAN LIM XIAO PING & ANOR

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
ROHANA YUSUF JCA
PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: Q-02-1220-07-2014]
22 MARCH 2016

SUCCESSION: *Will – Last will and testament – Executor of estate – Refusal of executor to distribute estate to other beneficiaries in accordance to terms of last will – Recovery of expenses – Whether executor produced documentary evidence of various payments made in taking care of deceased – Whether expenditure proved to be exclusively for benefit of testator – Whether there was provision for executor to recover expenses undertaken for sole benefit of testator – Non-naming of executor's children as beneficiaries – Whether valid ground for non-distribution of assets – Whether executor disclosed caveatable interest*

The deceased died on 14 June 2011, leaving a last will and testament ('the said last will'). She had two sons, one of which was Simon ('the appellant'). The appellant was named the executor of the estate of the deceased which consisted of two pieces of land and monies in fixed deposit accounts held in various banks. The beneficiaries under the said last will were the appellant and two grandchildren of the deceased who were the children of the appellant's brother. The will bequeathed the appellant with a piece of land and fixed deposits in two banks. The other piece of land and fixed deposits in four other banks were to be shared equally by the two grandchildren of the deceased. However, having transferred a piece of the land ('Lot 1071') and all the monies in the fixed deposit account to himself as bequeathed in the said last will, the appellant refused to transfer the other piece of land ('Lot 1070') and the monies in the bank to the grandsons of the deceased named in the said last will. The appellant also entered a caveat on the other piece of land. The named grandsons of the deceased ('the plaintiffs/respondents') thus filed an action in the High Court against the appellant by way of originating summons seeking orders that the appellant (i) transfer the said land to them; (ii) transmit and pay out the money in the fixed deposit accounts to them; and (iii) remove the caveat entered by him on the said land. The High Court Judge allowed the plaintiffs' application. Dissatisfied, the appellant appealed. The issues that arose were (i) whether there was sufficient evidence that the appellant had spent RM158,563 on medical expenses and caring of the deceased; (ii) whether the sum of RM158,563 must have been agreed by the deceased that it was recoverable or claimable at the time the expenses were incurred for it to be 'legally recoverable' under s. 17 of the Administration of Estate Ordinance (Sarawak) ('the Ordinance); (iii) whether

A the non-naming of the appellant's children as beneficiaries of the estate of the deceased was a valid ground for not distributing the assets to the plaintiffs; and (iv) whether the appellant disclosed any caveatable interest.

Held (dismissing appeal with costs; affirming decision of High Court) Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

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(1) It was incumbent on the appellant who claimed and asserted that he had spent the amount which he said was recoverable from the estate to show more cogent evidence of the spending by producing medical receipts and household bills that he had paid. It was pertinent to note and consider that the appellant had his own business while the deceased was staying with him. For the appellant to recover the money that he had spent on the deceased in taking care of her before her death, the spending must be exclusively for the benefit of the testator then. If it was mixed expenditure which included also expenses for the benefit of the appellant and his family, those expenses must be separated and excluded. In this case, the appellant had not produced or exhibited any documentary evidence of the various payments that he had made throughout the years in taking care of the deceased. Therefore, the judge was correct in holding that there was a total absence of evidence to support the appellant's claim. (para 13)

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(2) The last will of the deceased was silent on the recoverability of the money spent for her benefit by the named executor of the last will. There was no provision for the executor to recover any of the expenses that he had undertaken for the sole benefit of the deceased (as testator) from the estate. On the contrary, the last will imposed an obligation on the executor to collect all monies due to the testator from any source where current or in the future and to hold the moniescollected in trust for the testator after paying for the testator's just debts, household bills, medical bills, funeral expenses and any testamentary expenses to distribute the same in accordance with the wishes of the testator in her last will. Thus, to enable the appellant to claim the sum of RM158,563 as legally recoverable debt from the estate, he must show that the expenses he had incurred had been agreed by the deceased at the material time. The appellant, however, had not shown any evidence of any money collected for and on behalf of the estate. The appellant also did not show evidence that the estate did not have sufficient funds to pay for all the bills and expenses incurred by the testator, so much so that he had to meet the testator liabilities by dipping into his own pocket. Thus, the issue as to whether the sum of RM158,563 purportedly expended by the appellant was legally recoverable did not arise at all. (paras 14-16)

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(3) The appellant, as the executor of the deceased estate, had the authority under the provision of the last will to deal with the residue of the estate. However, the residue of the estate could only come into play once all the obligations as to the principal distribution of the estate had been performed and what remained of the estate after the distribution was entirely at the discretion of the executor. The appellant had not completed the distribution of the estate according to the wishes of the testator in her last will and testament. Instead, the appellant refused to distribute the estate in accordance to the terms of the last will to the other beneficiaries of the estate ie the plaintiffs/respondents after he had transferred what was due to him from the estate. Therefore, there could not be any residue in the estate for the appellant to distribute to his children who were not named in the said last will of the deceased, even if he had wanted, under the power given to him under the said will. (para 17)

(4) The grounds stated by the appellant in his statutory declaration to support the entry of the caveat did not disclose any caveatable interest. Lot 1071 had been transferred to the appellant; and the plaintiffs were not challenging this. From the cause papers, the plaintiffs only claimed what was rightly due to them under the last will that was Lot 1071. Therefore, in so far as the caveat was concerned, there was no serious issue to be tried. The balance of convenience did not favour the appellant to have the caveat remain on the said land until he could prove his entitlement to be repaid the amount of RM158,563 that he claimed he had purportedly expended for the benefit of the deceased, the testator of the last will and testament. (para 18)

Bahasa Malaysia *Headnotes*

Si mati meninggal dunia pada 14 Jun 2011 meninggalkan wasiat terakhirnya ('wasiat terakhir tersebut'). Si mati mempunyai dua anak lelaki, satu daripadanya adalah Simon ('perayu'). Perayu dinamakan sebagai pentadbir harta pusaka si mati iaitu dua bidang tanah dan wang dalam akaun simpanan tetap dalam pelbagai bank. Benefisiari di bawah wasiat terakhirnya adalah perayu dan dua orang cucu si mati iaitu anak-anak abang perayu. Wasiat mewasiatkan perayu dengan sebidang tanah dan deposit tetap dalam dua buah bank. Bidang tanah yang satu lagi serta deposit tetap dalam empat bank lain adalah untuk dikongsi bersama antara dua cucu si mati. Walau bagaimanapun, selepas memindahkan sebidang tanah ('Lot 1071') dan semua wang dalam akaun simpanan tetap kepada dirinya sendiri seperti yang diwasiatkan dalam wasiat terakhirnya, perayu enggan memindahkan tanah yang satu lagi ('Lot 1070') dan wang dalam bank kepada cucu-cucu si mati yang dinamakan dalam wasiat terakhir tersebut. Perayu juga memasukkan kaveat atas tanah yang satu lagi. Cucu-cucu si mati ('plaintif-plaintif/responden-responden') memfailkan guaman di Mahkamah Tinggi terhadap

perayu melalui saman pemula, menuntut perintah agar plaintif (i) memindahkan tanah tersebut kepada mereka; (ii) menyerahkan dan membayar wang dalam deposit tetap kepada mereka; dan (iii) membatalkan kaveat yang dimasukkan atas tanah tersebut oleh perayu. Hakim Mahkamah Tinggi membenarkan permohonan plaintif-plaintif. Tidak berpuas hati, perayu merayu. Isu-isu yang timbul adalah (i) sama ada terdapat keterangan bahawa perayu membelanjakan RM158,563 untuk perubatan dan jagaan si mati; (ii) sama ada jumlah RM158,563 sepatutnya dipersetujui oleh si mati boleh diperolehi semula atau boleh dituntut pada masa perbelanjaan ditanggung untuk membolehkannya 'diperolehi secara sah' di bawah s. 17 Ordinan Pentadbiran Harta Pusaka (Sarawak) ('Ordinan'); (iii) sama ada kegagalan menamakan anak-anak perayu sebagai benefisiari harta pusaka si mati adalah alasan kukuh untuk tidak mengagihkan aset-aset kepada plaintif-plaintif; dan (iv) sama ada perayu mendedahkan apa-apa kepentingan yang boleh dikaveatkan.

Diputuskan (menolak rayuan dengan kos; mengesahkan keputusan Mahkamah Tinggi)

Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:

(1) Wajib bagi perayu yang menyatakan dan menegaskan bahawa dia telah membelanjakan jumlah yang didakwa boleh diperolehi semula daripada harta pusaka untuk menunjukkan keterangan yang lebih meyakinkan berkenaan perbelanjaan tersebut dengan mengemukakan resit perubatan dan bil rumah yang dibayarnya. Penting untuk mengambil kira bahawa perayu mempunyai perniagaan sendiri semasa si mati tinggal bersama-samanya. Untuk perayu memperolehi semula wang yang telah dia belanjakan semasa menjaga si mati sebelum kematiannya, perbelanjaan mestilah semata-mata untuk manfaat pewasiat. Jika ia perbelanjaan bercampur yang termasuk perbelanjaan untuk manfaat perayu dan keluarganya, perbelanjaan itu harus diasingkan dan dikecualikan. Dalam kes ini, perayu gagal mengemukakan atau mengeskhibitkan apa-apa keterangan dokumentar untuk membuktikan bayaran-bayaran yang telah dia buat selama dia menjaga si mati. Oleh itu, hakim betul dalam memutuskan bahawa tiada keterangan secara keseluruhan untuk menyokong tuntutan perayu.

(2) Wasiat terakhir si mati tidak menyatakan apa-apa tentang perolehan semula wang yang dibelanjakan untuk manfaatnya oleh pentadbir wasiat terakhir. Tiada peruntukan untuk pentadbir memperolehi semula apa-apa perbelanjaan yang ditanggungnya untuk manfaat tunggal si mati (sebagai pewasiat) daripada harta pusaka. Sebaliknya, wasiat terakhir mewajibkan pentadbir mengumpul semua wang yang perlu dibayar kepada pewasiat daripada mana-mana sumber semasa atau pada masa akan datang dan untuk memegang wang yang telah dikumpulkan dalam

amanah bagi pewasiat selepas membayar hutang-hutang, bil-bil rumah, perubatan, perbelanjaan pengebumian dan apa-apa perbelanjaan wasiat untuk diagihkan mengikut permintaan pewasiat dalam wasiat terakhirnya. Oleh itu, untuk membolehkan perayu menuntut jumlah RM158,563 sebagai hutang boleh tuntut di bawah harta pusaka, dia harus membuktikan bahawa perbelanjaan yang ditanggungnya dipersetujui oleh si mati pada masa material. Perayu, walau bagaimanapun, tidak mengemukakan keterangan bahawa wang telah dikumpulkan untuk atau bagi pihak harta pusaka. Perayu juga tidak mengemukakan apa-apa keterangan bahawa harta pusaka tidak mempunyai dana yang cukup untuk membayar segala bil dan perbelanjaan yang ditanggung oleh pewasiat, sehingga dia terpaksa menggunakan wangnya sendiri untuk memenuhi liabiliti pewasiat. Isu sama ada jumlah RM158,563 yang kononnya dibelanjakan oleh perayu boleh diperolehi balik secara sah tidak timbul sama sekali.

(3) Perayu sebagai pentadbir harta pusaka si mati mempunyai kuasa di bawah peruntukan wasiat terakhir untuk berurusan dengan baki harta pusaka. Walau bagaimanapun, baki harta pusaka hanya boleh berkesan apabila semua kewajipan pengagihan utama harta pusaka dilaksanakan dan apa yang masih kekal dalam harta pusaka selepas pengagihan adalah atas budi bicara pentadbir sepenuhnya. Perayu tidak menyempurnakan pengagihan harta pusaka menurut permintaan pewasiat dalam wasiat terakhirnya. Sebaliknya, perayu enggan mengagihkan menurut syarat-syarat wasiat terakhir kepada benefisiari-benefisiari harta pusaka yang lain iaitu plaintif-plaintif/responden-responden selepas pentadbir telah memindahkan haknya daripada harta pusaka. Oleh itu, tiada baki dalam harta pusaka untuk perayu mengagihkan kepada anak-anaknya yang tidak dinamakan dalam wasiat terakhir si mati, walaupun pentadbir ingin berbuat demikian, di bawah kuasa yang diberikan kepadanya di bawah wasiat tersebut.

(4) Alasan-alasan yang dinyatakan oleh perayu dalam akuan berkanun untuk menyokong kemasukan kaveat tidak mendedahkan apa-apa kepentingan untuk dikaveatkan. Lot 1071 telah dipindah milik kepada perayu; dan plaintif-plaintif tidak membuat bantahan terhadap perkara ini. Berdasarkan kertas kausa, plaintif-plaintif hanya menuntut apa yang mereka berhak terima di bawah wasiat terakhir iaitu Lot 1071. Oleh itu, setakat kaveat berkenaan, tiada isu serius perlu dibicarakan. Imbangan kebarangkalian tidak memihak kepada perayu untuk mengekalkan kaveat atas tanah tersebut sehingga dia boleh membuktikan haknya untuk dibayar balik jumlah RM158,563 yang didakwa telah dia belanjakan untuk manfaat si mati, pewasiat wasiat terakhir tersebut.

Case(s) referred to:
Choo Tiong Hin & Ors v. Choo Hock Swee [1958] 1 LNS 16 HC ***(refd)***

Legislation referred to:
Administration of Estate Ordinance (Sarawak) (Cap 80), s. 17

For the appellant - Ernest Chua; M/s Ernest Chua & Co Advocs
For the respondents - Arthur Lee Cheng Chuan (Lee Yi Eng with him); M/s Arthur Lee, Lin & Co Advocs

[Editor's note: Appeal from High Court, Kuching; Originating Summons No: KCH-24-188-12-2013 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

[1] One Chen Hon Chow (deceased) died on 14 June 2011 leaving a last will and testament ("the said last will"). She has two sons. Simon Lim (Simon), the appellant (the defendant in the High Court) and another. Simon was named the executor of the estate of the deceased. The estate of the deceased consisted of two pieces of land and monies in fixed deposit accounts held in various banks. They are as follows:

(i) Lot 1070 Block 218 Kuching North Land District situate at Arang Road Kuching;

(ii) Lot 1071 Block 218 Kuching North Land District situate at Arang Road Kuching;

(iii) Fixed deposit account no. 1101-0292515-68-7, account no. 11010284475-68-0 and account no. 1103-0004340-68-2 (all at Bumiputra Commerce Bank Berhad);

(iv) Fixed deposit account no. 33-045-201557-3 (Hong Leong Bank);

(v) Fixed deposit account no. 1103-0004340-68-2 (CIMB Bank Berhad).

[2] The beneficiaries under the said last will are Simon and two grandchildren of the deceased who are the children of the Simon's brother.

[3] The will bequeathed Simon with a piece of the land and fixed deposits in two banks. The other piece of land and fixed deposits in four other banks were to be shared equally by the two grandchildren of the deceased. However, having transferred a piece of the land (Lot 1071) and all the monies in fixed deposit account no. 33-045-201557-3 (Hong Leong Bank); fixed deposit account no. 1103-0004340-68-2 (CIMB Bank Berhad) to himself as bequeathed in the said last will, Simon refused to transfer the other piece of land (Lot 1070) and the monies in the bank to his two nephews, the grandsons of the deceased named in the said last will. Simon also entered a

caveat on the other piece of land. His nephews (the plaintiffs in the High Court) therefore filed an action against him by way of originating summons seeking for orders that Simon (i) transfers the said land to them; (ii) transmit and pay out the money in the fixed deposit accounts to them; (iii) remove the caveat entered by him on the said land, and (iv) pay their legal cost of RM150,000.

[4] The plaintiffs' affidavit in support of the originating summons was affirmed by the first plaintiff Colonel Christian Lim Xiao Ping on 18 December 2013 as to the undisputed facts stated above.

[5] Simon opposed the originating summons and had filed an affidavit in opposition affirmed on 17 February 2014.

[6] The reasons given by Simon for refusing to effect the transfer of the other piece of land and to transmit the monies in the fixed deposit accounts to the plaintiffs can be seen from the averment in para. 2 of his affidavit in opposition:

> 2. I refer to paragraph 2 of the Last Will of Chen Hon Chow which clearly stipulates that as the Executor I am authorised to collect all monies due to my late mother from any and all sources – and to hold trust and after paying my late mother's just debts, household bills, medical bills, funeral and any testamentary expenses to distribute the same in accordance with my late mother's Last Will. I am advised my Counsel Mr Ernest Chua & I verily believe to be true that as the Executor and Trustee of the Last Will of my late mother Chen Hon Chow I am duty bound and legal entitled to collect all monies due to my late mother, pay out all her just debts and other expenses named in paragraph 2 of my late mother's Last Will and distribute the balance (if any) to all the beneficiaries named in the Last Will of the Late Chen Hon Chow.

[7] As for the caveat that he had entered on the land (Lot 1070) Simon averred in paras. 9 and 10 of his affidavit in opposition as follows:

> 9. In reply to paragraph 8 (ii) of Colonel Lim's Affidavit I contend that the Caveat lodged by the Defendant was based on a Statutory Declaration affirmed by me on 12.12.2012. A copy of the said Caveat dated 12th December 2012 and a copy of the Statutory Declaration dated 12th December 2012 is now shown to me and exhibited hereto marked as "A" & "B" respectively.
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> 10. I now crave leave to refer to paragraphs 6, 7, 8 & 9 of my Statutory Declaration dated 12th December 2012. I am advised by my Counsel Mr Ernest Chua and I verily believe to be true that based on the said paragraphs 6, 7, 8 & 9 of my Statutory Declaration I have a Caveatable interest on the said land, namely Lot 1070 Block 218 Kuching North Land District.

[8] In his statutory declaration dated 12 December 2012 Simon justified his caveatable interest as follows:

> 6. Before my mother Chen Hon Chow passed away on 14th of June 2011 she had been very ill and bedridden for more than 3 years. I was the ONLY one looking for her and I employed maids to help look after her. I was the only one providing finance to nurse her and to keep her as comfortable as I could. I have expended a sum of RM158,563.00 to look after my late mother. On the other hand, the two grandsons, namely, Colonel Christian Lim Xiao Ping and Pius Elijah Lim Hsien Ping had not spent a single cent on my late mother. Moreover they seldom visited my late mother for the last 3 years before she passed away.
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> 8. As the sole care taker of my late mother (the deceased) and as the Executor and Trustee of the Last Will of Chen Hon Chow I say that I am entitled to recover all the expenses paid by me, ie, the sum of RM158,563 from Colonel Christian Lim Xiao Ping and Pius Elijah Lim Hsien Ping.
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> 9. For the recovery of the said sum of RM158,563 from Colonel Christian Lim Xiao Ping and Pius Elijah Lim Hsien Ping and to protect my interest in the said land I intend to lodge a Caveat on the said land. I say that I have a caveatable interest in the said land.
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> 10. The purpose of making this Statutory Declaration is to support my Caveat on the said land, namely Lot 1070 Block 218 Kuching North Land District.

[9] The learned judge heard the application and allowed it. Not satisfied with the decision Simon now appeals to this court. This is his appeal.

High Court Findings

[10] Relying on s. 17 of the Administration of Estate Ordinance (Sarawak) (Cap 80) ("the Ordinance") on the duties of an executor of the estate, the learned judge ruled that for the debt claimed by Simon to be 'legally recoverable' the alleged expenses must have been agreed by the deceased to be so at the time they were incurred. Secondly, the learned judge found that there is no evidence – 'a total absence of evidence' – that Simon had indeed spent RM158,563 on medical expenses and caring of the deceased. Her Ladyship also held that 'if the sum expended at that time was simply from the goodness of his heart as any filial son whose mother was under his sole care at that material time, then the amount is not 'legally recoverable'. She relied on the Singapore's Court of Appeal decision in *Choo Tiong Hin & Ors v. Choo Hock Swee* [1958] 1 LNS 16; [1959] MLJ 67. Further she held that Simon could not use the non-naming of his children as beneficiaries in the said will as an excuse not to distribute the estate as the deceased had wanted in her will.

Appellant's Counsel Submission

[11] In his written submission, and repeated in his oral submission before us, learned counsel submitted five grounds on this appeal. Firstly, the learned judge erred in holding that there is a total absence of evidence that the Simon actually had spent RM158,563 on his late mother. He argued that Simon had affirmed in para. 2 of his affidavit in opposition and para. 6 of his statutory declaration that he had spent that sum on his mother's medical expenses and care. This evidence, learned counsel said, was never considered by the learned judge. Secondly, the learned judge erred in fact and in law by holding that the sum RM158,563 must have been agreed by the deceased to be recoverable or claimable at the time the expenses were incurred for it to be 'legally recoverable' under s. 17 of the Ordinance. Learned counsel argued that para. 2 of the said last will and testament clearly authorised Simon to pay all the deceased's just debts, household bill, medical bills etc, which in this case amounted to RM158,563. He also argued that para. 6 of Simon's statutory declaration was never challenged by the respondents. Thirdly, learned counsel submitted that the learned judge erred in fact and in law in holding that the non-naming of Simon's children as beneficiaries of the estate of the deceased could not be a ground for not distributing the assets to the plaintiffs. He argued that para. 7 of the last will and testament of the deceased gives full authority to Simon as executor of the said last will to deal with the residue of the estate, which may include the distribution of the estate to Simon's children. The fourth and fifth grounds of appeal by Simon, the appellant is in relation to the caveat. Learned counsel submitted that the demand by the plaintiffs for the transfer of the land to them is detrimental to Simon (as executor of the estate) and is clearly against the interest and spirit of the last will of the deceased. He further argued that the plaintiffs demanded the transfer not only of Lot 1070 but also Lot 1071. He said this is obvious from the reading of para. 4 of the plaintiffs' affidavit in reply.

Our Decision

[12] We will now deal with each of the grounds raised by Simon, the appellant.

[13] As for the first ground on the total absence of evidence, we are aware that Simon in his affidavit in opposition and statutory declaration averred and declared that he had spent the amount RM158,563 on the medical bills and other expenses in taking care of the deceased during her lifetime. However we are of the view that this is insufficient. It is incumbent on Simon who claimed and asserted that he had spent the amount which he said is recoverable from the estate to show more cogent evidence of the spending by producing medical receipts and household bills that he had paid. It is pertinent to note and consider that Simon has his own business. He claimed that he was working as a mechanic and that the deceased was at that time

staying with him. In our view, for Simon to recover the money that he had spent on the deceased in taking care of her before her death, the spending must be exclusively for the benefit of the testator then. If it is a mixed expenditure which includes also expenses for the benefit of Simon and his family, that expenses must be separated and excluded. In this case Simon had not produced or exhibited any documentary evidence in his affidavit of the various payments that he had made throughout the years in taking care of the deceased. Therefore in our opinion, the learned judge was right to hold that there is a total absence of evidence to support Simon's claim.

[14] As for the second ground that the sum of RM158,563 purportedly expended by Simon is legally recoverable, we are of the view that this issue does not arise at all. Firstly, the last will of the deceased is silent on the recoverability of the money spent for her benefit by the named executor of the last will. Paragraph 2 of the last will reads:

> 2. I hereby direct and authorise my Executor of this my Last Will to collect all monies due to me from any and all sources and/or which may accrue to me in future and to hold trust and after paying my just debts, my household bills, my medical bills, funeral and any testamentary expenses to distribute the same in accordance with this my Last Will.

[15] It is obvious that reading that para. 2 of the last will, there is no provision for the executor to recover any of the expenses that he had undertaken for the sole benefit of the deceased (as testator) from the estate. On the contrary, our view is that para. 2 of the last will imposes obligation on the executor to collect all monies due to the testator from any source where current or in the future and to hold the monies collected in trust for the testator after paying for the testator's just debts, household bills, medical bills, funeral expenses and any testamentary expenses to distribute the same in accordance with the wishes of the testator in her last will. In other words the money that is to be used for the expenses of the testator either during her lifetime or at her death are to be paid out from the estate. In this case Simon, as the executor of the deceased estate, had not shown any evidence of any money collected for and on behalf of the estate. Simon also had not shown any evidence that the estate at the material times did not have sufficient funds to pay for all the bills and expenses incurred by the testator, so much so that he had to meet the testator liabilities by dipping into his own pocket.

[16] In the circumstances, we agree with the learned judge that to enable Simon to claim the sum RM158,563 as legally recoverable debt from the estate, he must show that the expenses he had incurred had been agreed by the deceased at the material times.

[17] As for the third ground, we are of the view that there is no merit in this submission. Learned counsel is right to say that Simon as the executor of the deceased estate has the authority under the provision of the last will to deal with the residue of the estate. However the residue of the estate could

only come into play once all the obligations as to the principal distribution of the estate have been performed and what remain of the estate after the distribution is entirely at the discretion of the executor. In this case Simon, as the executor of the estate, had not completed the distribution of the estate according to the wishes of the testator in her last will and testament. Instead, Simon simply refused to distribute the estate in accordance to the terms of the last will to the other beneficiaries of the estate ie, the plaintiffs/respondents after he had transferred what was due to him from the estate. Therefore, there cannot be any residue in the estate for Simon to distribute to his children who were not named in the said last will of the deceased, even if he had wanted to, under the power given to him under the said will.

[18] With respect to the fourth and fifth grounds relating to the caveat entered by Simon on Lot 1070, we are of the view that the grounds stated by Simon in his statutory declaration to support the entry of the caveat do not disclose any caveatable interest. The sum of RM158,563 claimed by Simon as expenses he had expended on the deceased has not been proved to be legally recoverable debt from the estate. Learned counsel's argument that the plaintiffs in this case were demanding all the lands left by the testator and not just Lot 1070 is unsustainable and not supported by evidence. Firstly, Lot 1071 had been transferred to Simon; and the plaintiffs are not challenging this. Secondly, from the cause papers we are satisfied that the plaintiffs only claimed what is rightly due to them under the last will that is Lot 1070. Therefore we are of the view that in so far as the caveat is concerned there is no serious issued to be tried. Thus, the balance of convenience does not favour Simon to have the caveat remains on the said land until he can prove his entitlement to be repaid the amount of RM158,563 that he claimed he had purportedly expended for the benefit of the deceased, the testator of the last will and testament.

[19] For the above reasons we dismissed this appeal with cost of RM5,000 to the respondents/plaintiffs and we affirmed the High Court decision.